IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1381

MIAMI COPPER COMPANY DIVISION,
TENNESSEE CORPORATION,

Petitioner,

vs.

STATE TAX COMMISSION OF THE
STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF ARIZONA, DIVISION TWO

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT K. CORBIN
Attorney General

IAN A. MACPHERSON
Assistant Attorney
General
Attorneys for
Respondent.

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INTRODUCTION

A. Question Presented

Respondent disagrees with Petitioner's statement of questions presented. The only question presented in Petitioner's brief is whether Respondent's administration of the relevant transaction privilege tax provisions, pursuant to which an additional assessment for transaction privilege taxes was made, denies Petitioner the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

B. Statement of Facts

The tax at issue is imposed upon the privilege of engaging in the business of mining, quarrying, smelting, or producing for sale, profit or commercial use various mineral products. Arizona Revised Statutes Sections 42-1309(A) and 42-1310 (2)(a). The amount of the tax is gener-

ally measured by the gross proceeds of sales or gross income from the business. If, however, the mineral product is shipped or transported out of state without being sold, or shipped out of state in an unfinished condition, then the value of the product as it existed when transported out of state, and before it enters interstate commerce, is the basis upon which the transaction privilege tax is measured. A.R.S. § 42-1316.

The Petitioner is engaged in the business of mining and producing copper for profit or commercial use. (Petitioner's brief, p. 13.) The Arizona Court of Appeals found that Petitioner's business extended to services required to prepare its mineral products for their intended sale, even if some of these services were performed by others under contract. (Pe-

titioner's Brief, p. 5a[1])

In conducting its business activities, Petitioner extracts copper concentrates and copper precipitates from its mines in Arizona. These materials are then delivered to the Inspiration Consolidated Copper Company and the Phelps Dodge Corporation to be smelted for a per-ton fee, thereby producing blister copper. The blister copper is then shipped directly outside of Arizona for further refining. The per-ton smelting fee was not based upon the increase in value of the ore caused by the smelting.

In computing the additional assessment, the Respondent included in the

1. A minor typographical error exists in Petitioner's Appendix "A" at pp. 4a and 5a. The proper citation to the definition of "business" in the Arizona transaction privilege tax code is "A.R.S. § 42-1301" rather than "A.R.S. § 14-1301." See 589 P.2d at 26, 27.

transaction privilege tax base the value of the blister copper, i.e. the value of the copper ore after smelting. The Respondent included no other value or amount in Petitioner's taxable base.

A.R.S. § 42-1310(2)(a) also applies to the business of smelting for profit or commercial use various mineral products. Consequently, the per-ton smelting fee that was paid by Petitioner to Inspiration Consolidated Copper Company and to the Phelps Dodge Corporation was includable in the tax base of Inspiration and Phelps Dodge respectively. Any transaction privilege tax measured by such per-ton smelting charges would have been imposed upon and paid by Inspiration and Phelps Dodge.

The Petitioner, during the taxable periods in question, attempted to deduct from its own taxable base the per-ton smelting fee it had paid to Inspiration

and to Phelps Dodge. Petitioner contended that since the smelting fee was includable in the taxable base of Inspiration and Phelps Dodge, and since Petitioner's taxable base included the increase in the value of the copper as a result of the smelting, to deny it a deduction for such smelting charges would in effect constitute double taxation of the same increase in value.

Petitioner further argued that, since most taxpayers pass on the economic burden of their transaction privilege tax, it was in effect required to pay more taxes than integrated companies that operated not only their own mines but also their own smelting facilities. Since such integrated producers built their own smelting facilities, they did not contract for smelting services and thus no separate tax would be imposed as a result of any smelting charges.

The trial court held that the copper concentrates and precipitates entered interstate commerce when such materials were placed on rail cars for shipment to the smelters. Therefore, the taxable value should have been determined prior to smelting.

The Arizona Court of Appeals reversed the trial court and held that the materials did not enter interstate commerce at any time prior to the completion of the smelting process in Arizona. Since the interstate commerce question was not raised in Petitioner's brief, that issue is not before this Court.

The Court of Appeals also concluded that no "double taxation" was involved in the assessment, and that the equal protection of the laws was not denied Petitioner. The Petitioner thereafter petitioned for review in the Arizona Supreme Court, which petition was denied. Peti-

tioner then filed this Petition for Writ of Certiorari.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

A. Petitioner's Argument

A writ of certiorari might be granted by the Supreme Court in situations where a state court has decided a federal question of substance not previously determined by the Supreme Court, or where a state court has decided such question not in accordance with prior applicable decisions. U.S. Sup. Ct. Rule 19(1)(a). Neither standard is applicable in this case.

On page 10 of its brief, Petitioner argues that under the decision of the Arizona Court of Appeals, the Petitioner's copper, which is smelted by contract in Arizona, must enter the market for such products subject to the transaction privilege tax being imposed twice on the value added thereto by smelting.

In contrast, Petitioner argues, a taxpayer which has integrated mining and smelting activities only pays the transaction privilege tax on the value of such products attributable to smelting but once. On the basis of this argument, Petitioner contends that it has been denied the equal protection of the laws guaranteed to Petitioner by the Fourteenth Amendment to the United States Constitution.

B. Petitioner Misconstrues the Operation of the Transaction Privilege Tax

Contrary to Petitioner's contention, the increase in value of Petitioner's copper is not subject to taxation twice. A.R.S. §§ 42-1310 and 42-1316 require the imposition of the transaction privilege tax to be measured by the value of the copper shipped out of state, whether the taxpayer contracts the smelting of its copper to a separate entity or performs

the smelting itself. The transaction privilege tax provisions make no distinction based on the manner in which the copper is smelted. Furthermore, neither taxpayer is permitted to deduct smelting expenses incurred in Arizona, whether such expenses consist of contractual payments to an independent smelter, or the initial investment, and maintenance and operating expenses of companies that have their own smelters. Consequently, Petitioner is treated no differently than any other producer of mineral products for sale or commercial use.

It is true that contract smelters that smelt copper for other producers must include in their own taxable base the gross income they receive from such smelting activities. That does not necessarily mean, however, that a tax is imposed twice on the value added to the copper by smelting.

As has been previously stated, Petitioner's transaction privilege tax is measured by the value of the copper it produces in Arizona, including the value added to the ore by smelting. The independent smelter's tax base, however, is measured by the per-ton smelting fee it receives pursuant to the contract with Petitioner. There is nothing in the record to indicate that such smelting fee is based in any way on the value added to the copper by smelting.[2]

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2. While the record is not clear on this point, it is possible that the blister copper does not have a readily ascertainable market value. Therefore, Petitioner may be assuming that the cost of smelting the copper reasonably approximates the increase in the value of the copper as a result of the smelting. This still would not mean that an independent smelter's tax base corresponds to the increase in value of the copper, as is asserted by Petitioner. Whether the cost of smelting copper does reasonably approximate the increase in the value of such copper is, of course, a question of state law.

The transaction privilege tax measured by the smelting fee is imposed on and paid by the company engaged in the business of smelting. It is possible, however, for the expense of this tax to be passed on by the smelter to Petitioner, like any other expense may be, as a component of the flat per-ton smelting fee. This passing on of the economic burden of the tax does not mandate that the Arizona Legislature provide a deduction to Petitioner for its contractual smelting fees incurred in Arizona. In not providing for such a deduction, the Legislature may have determined that since integrated companies are not permitted to deduct their own smelting expense incurred in Arizona, such as depreciation, maintenance, property taxes, and other operating expenses, companies such as petitioner will not be permitted to take a similar deduction for their own smelting expenses. Consequently, Petitioner is not being treated differently from other integrated companies, and therefore no denial of equal protection can exist.

C. The Arizona Court of Appeals' Decision is Not Contrary to Prior Decisions of this Court.

Since Petitioner's Arizona smelting expenses may be composed of different items than the smelting expenses of integrated companies in Arizona, Petitioner asserts that it is denied the equal protection of the laws. The authorities cited by Petitioner, however, do not support this assertion.

Respondent agrees that in the exercise of their taxing powers, the states are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But in the field of taxation, the states have a wide latitude in selecting the subjects of taxation. As this Court stated in Lehnhausen v. Lake Shore Auto

Parts Co., 410 U.S. 356 (1973) at 359:

> "The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. The test is whether the difference in treatment is an invidious discrimination. (Citation omitted.) Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have a large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."

Later in the opinion in Lehnhausen v. Lake Shore Auto Parts Co., supra, in reviewing Madden v. Kentucky, 309 U.S. 83 (1940), where this Court upheld an ad valorem tax of 50 cents per $100.00 on out-of-state deposits, while only imposing a tax of 10 cents per $100.00[3] on deposits within the State, this Court stated, 410 U.S. at 364:

> "The classification was sustained against the charge of invidious discrimination, the Court noting that 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification' Id., at 88. There is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' Ibid. And the Court added, 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'"

Based upon the foregoing analysis, this Court upheld the Illinois personal property tax on the property of corporations even though no similar tax was levied on the property of individuals.

Because of the wide discretion given to the States in selecting the subjects of taxation, this Court has upheld various taxing schemes that in some way favored one group of taxpayers over another. In

3. The tax on deposits within Kentucky was 10 cents per $100.00, but a typographical error in the Lehnhausen decision, supra, 410 U.S. at 364, describes it as a tax of 10 cents per $1,000.00.

Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923), this Court upheld an occupation tax on persons engaged in the business of mining or producing ore on their own account, i.e. as owner or lessee. In Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910), this Court upheld a gross receipts tax that was imposed on persons engaged in the business of wholesale sale of coal oil, naphtha and other mineral oils, even though no such tax was imposed on wholesalers of other articles such as sugar, bacon, coal and iron. In Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959), this Court upheld a tax imposed on property stored or kept on hand as merchandise, even though merchandise and agricultural products belonging to a nonresident, if held in a storage warehouse for storage only, were exempt.

Finally, in American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900), this

Court upheld a license tax imposed on manufacturers engaged in the business of refining sugar, even though planters and farmers grinding and refining their own sugar and molasses were exempt. In upholding the classification, the Court stated, 179 U.S. at 92:

> "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid."

After reviewing numerous cases where various classifications were upheld as not denying equal protection, this Court concluded, 179 U.S. at 95:

> "The Constitution of Louisiana classifies the refiners of sugar for the purpose of taxation into those who refine the products of their own plantations, and those who engage in a general refining business, and refine sugars purchased by themselves or put in their hands by others for that purpose, imposing a tax only upon the latter class.... The discrimination is obviously intended as an encouragement to agriculture,

and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

From the foregoing cases, it is clear that if a classification for tax purposes is based upon a reasonable distinction, and everyone within a class is treated equally, there is no denial of equal protection. Consequently, even if the Arizona transaction privilege tax provisions were to make a distinction between companies such as Petitioner, and integrated companies, such distinction would have been reasonable. Companies such as Petitioner do not incur the capital outlay and other related expenses of owning and operating a smelter. Also, companies such as Petitioner do not bear any added property tax burden that may be associated with owning and operating smelting facilities. But as Petitioner states on page 12 of its brief, it has never been its con-

tention that the transaction privilege tax provisions were unconstitutional on their face. Therefore, the foregoing cases cited by Petitioner are not relevant here.

D. The Transaction Privilege Tax Provisions Were Not Administered by Respondent in a Discriminatory Manner.

Petitioner argues on page 13 of its brief that while the Arizona statute might appear fair and impartial on its face, the State has purportedly administered said statute in such a way as to place a burden on Petitioner not placed on other taxpayers within the same class. Petitioner further states in its argument that unlike integrated companies that do their own smelting, Petitioner is burdened with its payment of the transaction privilege tax based on the total value of its copper, which included the increment of value added by smelting, and with the added economic effect of the imposition of a transaction privilege tax on the smelting con-

tractor measured by the same increment of value.[4]

In support of its argument, Petitioner cites Yick Wo v. Hopkins, 118 U.S. 356 (1886), Weissinger v. Boswell, 330 F. Supp. 615 (M.B. Ala. N.D. 1971), and Delaware L. & W. R. Co. v. Kingsley, 189 F. Supp. 39 (D. N.J. 1960), for the proposition that if a statute, fair on its face, is unfairly or discriminatorily applied, then such application of the statute may be in violation of the Equal Protection Clause of the Constitution. A review of these cases will illustrate that they are distinguishable from this case.

4. This is Petitioner's characterization of the measure of the tax imposed on the smelting contractor. As Respondent has previously pointed out, however, the measure of the tax for the smelting contractor is not the added increment in value, but its gross income derived from the business of smelting; that is, the flat per-ton smelting fee it receives from Petitioner.

Yick Wo v. Hopkins, supra, was a criminal case involving the validity of an ordinance that gave the Board of Supervisors of the City and County of San Francisco the authority to refuse permission to carry on a laundry business except when located in a building of brick or stone. Any such refusal could be exercised by the Board completely at its own discretion. The facts of the case revealed that, with one exception, only members of the Chinese race were refused permission to carry on a laundry business in a wood building. Based on the foregoing facts, this Court held that the arbitrary and discriminatory actions of the Board were in violation of the Equal Protection Clause.

Both Weissinger v. Boswell, supra, and Delaware L. & W. R. Co. v. Kingsley, supra, involved a situation where even though the relevant statutes provided that all property was to be assessed at its

fair market value, state officials assessed certain properties at a higher percentage of fair market value than other property in the state. The Court in Delaware L. & W. R. Co. v. Kingsley, supra, dismissed the complaint for failure to state a cause of action in view of the fact that the taxpayers had adequate administrative and judicial remedies in the state.

The Court in Weissinger v. Boswell, supra, held that the systematic and intentional refusal of state officials to perform their duties according to the law offended both due process and equal protection. In reaching its decision, the Court stated that while the federal constitution does not prohibit a state from establishing reasonable classes of property and taxing those classes at different rates, if a state has decided that all property shall be taxed in the same way, then any

substantial disparity in taxation as a result of the failure of state officials to properly administer its tax laws will offend Due Process and the Equal Protection Clauses of the Constitution.

In the present case, the record is devoid of any showing that Respondent has not fairly administered the transaction privilege tax provisions. The transaction privilege tax law does not specifically provide for the deduction of smelting expenses. The deductions of such expenses incurred in Arizona are not allowed to companies, such as Petitioner, that contract out the smelting of its mineral product, nor to integrated producers that smelt their own mineral product. Both types of companies are treated fairly and equitably, and within the requirements of the Equal Protection Clause. The fact that the smelting expenses may be composed of different types of expenses does not

transform such expenses into something else.

From the foregoing it becomes evident that not only is Respondent's administration of the transaction privilege tax provisions in compliance with the Equal Protection Clause, but also that if Respondent were to allow Petitioner a deduction for its Arizona smelting expenses, which deduction is not authorized by the statute, the Respondent may be denying the equal protection of the laws to integrated producers who would not be allowed a similar deduction for their Arizona smelting expenses.

In Oliver Iron Mining Co. v. Lord, supra, the taxpayer argued that the occupation tax imposed on persons engaged in the business of mining or producing ore on their own account violated the Equal Protection Clause because royalty payments were allowed as a deduction. Even though

this Court did not decide that question because it was not properly before the Court, this Court did state, 262 U.S. at 180:

> "Among the deductions which the act provides shall be made from the value of the ore before computing the tax is the amount of royalties paid on the ore mined and produced during the year. This provision is assailed as working a serious discrimination in favor of those who operate under leases and pay royalties, as all the lessees do, and against owners who operate their own mines and pay no royalties. The question is an important one, and has not been before the Supreme Court of the State. It apparently requires a construction of the particular provision along with other parts of the act, and possibly of the state constitutional provision. After that it may be that there would be need for turning to the Fourteenth Amendment."

Respondent believes that a similar question would be raised if Respondent, without statutory authority, were to allow a smelting expense deduction to companies, such as Petitioner, that contract out their smelting activities, while at the

same time not allowing a similar deduction to integrated producers that perform their own smelting activities.

CONCLUSION

The burden is upon Petitioner to show a denial of equal protection. This Petitioner has failed to do. Petitioner has also failed to show how the decision of the Arizona Court of Appeals or the administration of the transaction privilege tax provisions by the Respondent is in conflict with prior decisions of this Court.

Respondent has shown, however, that under the proper interpretation of the transaction privilege tax privisions, not only has Petitioner been afforded equal protection of the laws, but Petitioner's position might deny other producers the equal protection of the laws. Therefore, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted this 4th day of April, 1979.

ROBERT K. CORBIN
Attorney General

IAN A. MACPHERSON
Assistant Attorney General
Attorneys for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 1979, three copies of the MEMORANDUM FOR RESPONDENTS IN OPPOSITION were mailed postage prepaid to

GRAYDON D. LUTHEY
SHEPPARD F. MIERS, JR.
CITIES SERVICE COMPANY
P. O. Box 300
Tulsa, Oklahoma 74102

JAMES R. MALOTT, JR.
MORRIS & MALOTT
P.O. Box 351
Globe, Arizona 85501
Attorneys for Petitioner

I further certify that all parties required to be served have been served.

ROBERT K. CORBIN
Attorney General

IAN A. MACPHERSON
Assistant Attorney General
Attorneys for Respondent.

SUBSCRIBED AND SWORN to before me this 4th day of April, 1979.

NOTARY PUBLIC

My commission expires:
August 24, 1982